

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 19, 2006

JESSE LANE DABBS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
Nos. 90-S-827, 90-S-828 Walter J. Kurtz, Judge

No. M2005-01727-CCA-R3-PC - Filed June 9, 2006

The Petitioner, Jesse Lane Dabbs, appeals the trial court's summary dismissal of his petition for post-conviction relief. The trial court determined that the petition was filed outside the statute of limitations and was time-barred. After a review of the record, the judgment of the Davidson County Criminal Court summarily dismissing the petition is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Jesse Lane Dabbs, Pro Se.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Tom Thurman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On June 8, 1990, the Petitioner was indicted on six counts of aggravated rape, two counts of aggravated kidnapping, and one count of attempted aggravated kidnapping. On June 6, 1991, the Petitioner entered best interest guilty pleas to five counts of aggravated rape and one count of attempted kidnapping. The remaining counts of the indictments were dismissed pursuant to the plea agreement. A sentencing hearing was held on June 20, 1991, and the Petitioner received an effective sentence of eighty-seven and one-half years for these convictions.

In June of 1992, the Petitioner filed his first petition for post-conviction relief, asserting that his pleas were involuntary and that counsel was ineffective for failing to seek a direct appeal of his sentences and requesting a delayed sentencing appeal to this Court. By agreed order dated January

21, 1993, the parties agreed that the petition “[was] well taken as to the extent of allowing the Petitioner an opportunity to be provided a delayed appeal from the sentence imposed in this matter.” The order further stated:

The parties further agree that the Petitioner has been afforded an opportunity to raise any other issues cognizable by means of a Petition for Post Conviction Relief. The Trial Court has specifically advised the Petitioner that by not raising any other issues that he specifically waives any further and future presentation of these issues by means of a Petition for Post Conviction Relief.

Thereafter, the Petitioner appealed his sentence and, on September 15, 1994, this Court affirmed the sentence as imposed by the trial court. See State v. Jesse L. Dabbs, No. 01C01-9308-CR-00253, 1994 WL 504413 (Tenn. Crim. App., Nashville, Sept. 15, 1994), perm. to appeal denied, (Tenn. Jan. 30, 1995).

The Petitioner subsequently filed a petition for writ of habeas corpus on April 2, 1997, challenging the validity of the indictments. On appeal, this Court concluded that the “indictments satisfy the standards established by our supreme court.” Jesse L. Dabbs v. State, No 03C01-9806-CR-00199, 1999 WL 615157, at *2 (Tenn. Crim. App., Knoxville, Aug. 16, 1999).

On May 25, 2005, the Petitioner filed the present petition for post-conviction relief alleging involuntariness of his pleas and ineffective assistance of counsel at the trial court level and on direct appeal. By order dated June 14, 2005, the trial court summarily dismissed the petition for post-conviction relief, finding that it was barred by the one-year statute of limitations. See Tenn. Code Ann. § 40-30-102(a). This timely appeal followed.

ANALYSIS

The Petitioner, relying on Williams v. State, 44 S.W.3d 464 (Tenn. 2001), argues that due process requires tolling of the statute of limitations because the January 21, 1993 agreed order incorrectly stated that the Petitioner was foreclosed from seeking further post-conviction relief. Citing Gibson v. State, 7 S.W.3d 47 (Tenn. Crim. App. 1998), the Petitioner submits that he was not foreclosed from seeking post-conviction relief as stated in the order because the proper procedure “was to either dismiss or abate any other issues while allowing the petitioner to pursue his delayed appeal[.]”

In Gibson, this Court provided guidance to the trial court when addressing petitions in which the request for a delayed appeal has been consolidated with an attack on the conviction. This Court instructed:

[T]he better procedure is for the trial court to grant the delayed appeal, when warranted, and dismiss the collateral attack upon the conviction without prejudice. We are cognizant of the statutory provision which contemplates the filing of only one petition for post-conviction relief from a single judgment. Tenn. Code Ann. § 40-30-

202(c). This statute provides that if a petition has been resolved on its merits, a subsequent petition must be summarily dismissed. Tenn. Code Ann. §§ 40-30-202(c); 40-30-206(b). Conversely, we interpret this to mean that those petitions not resolved “on their merits” are not subject to dismissal. *Id.* This procedure would allow the appellant to pursue his post-conviction relief after review from the supreme court.

Gibson, 7 S.W.3d at 50.

The Petitioner’s first petition for post-conviction relief was filed prior to enactment of the 1995 Post-Conviction Procedure Act. At the time the trial court entered its order in January of 1993, the relevant law was as follows:

In order to obtain post-conviction relief, a petitioner must allege that his conviction or sentence is void or voidable due to the abridgement of a constitutional right. Tenn. Code Ann. § 40-30-105 (1990). A post-conviction ground for relief is “waived” if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented. Tenn. Code Ann. § 40-30-112(b)(1) (1990); *House v. State*, 911 S.W.2d 705, 713-14 (Tenn. 1995). There is a rebuttable presumption that a ground for relief not raised in any such proceeding is waived. Tenn. Code Ann. § 40-30-112(b)(2) (1990). Additionally, our courts have repeatedly held that when a petitioner fails to present a ground for relief in his first post-conviction proceeding, that ground is waived for purposes of any subsequent post-conviction proceedings. As our supreme court stated long ago, “[t]here must be a finality to all litigation, criminal as well as civil.” *Arthur v. State*, 483 S.W.2d 95, 97 (Tenn. 1972).

Darrell Fritts v. State, No. 03C01-9803-CR-0016, 1999 WL 604430, at *2 (Tenn. Crim. App., Knoxville, Aug. 12, 1999) (footnote omitted).

The Petitioner’s reliance on Gibson is misplaced because the trial court’s statement was accurate based upon the law at the time. See id. (failure to raise issue in first post-conviction petition seeking delayed appeal waived ex post facto challenge to sentence in second petition). There is no misrepresentation which requires tolling of the statute of limitations. The Petitioner’s claims of an involuntary guilty plea and ineffective assistance of counsel at the trial court level were available grounds for relief when his first post-conviction petition was filed, and those claims were raised in his original 1992 post-conviction petition. It appears from the agreed order that the Petitioner abandoned or waived these issues when the State agreed that a delayed appeal should be granted.

The Petitioner also submits that appellate counsel was ineffective by failing to “properly raise Petitioner’s sentencing issues on appeal in regards to enhancement and consecutive sentencing.” Such an issue could not have been raised in the first petition since the conduct had not yet occurred. However, the instant petition was filed over ten years after the appeal was concluded. The statute of limitations bars a post-conviction petition alleging ineffective assistance of counsel during the delayed appeal. See Tenn. Code Ann. § 40-30-102(a).

The Petitioner filed this post-conviction petition over ten years after his sentence was upheld on direct appeal. The Petitioner has not alleged any of the exceptions for tolling the statute. He cites no new constitutional rule, refers to no new scientific evidence, and makes no claim that an earlier conviction has been overturned. See Tenn. Code Ann. § 40-30-102(b).

CONCLUSION

Consideration of the issues raised in this post-conviction petition is barred by the statute of limitations. Summary dismissal is affirmed.

DAVID H. WELLES, JUDGE